UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24

HORIZON LINES OF PUERTO RICO, INC. and INTERNATIONAL LONGSHOREMEN ASSOCIATION, LOCAL 1575	Case 24-CA-075533

COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGEMENT

TO THE HONORABLE BOARD:

COMES NOW Counsel for Acting General Counsel and very respectfully states and prays as follows:

I. BACKGROUND

1. On June 29, 2012, the Regional Director for Region 24 issued a Complaint and Notice of Hearing (the Complaint) in the above-captioned case alleging that the Respondent has violated Section 8(a)(1), and (5) of the Act. (Exhibit 1)
2. On July 13, 2012, the Respondent filed an answer admitting, in part, and denying in part, the allegations of the complaint and raising certain affirmative defenses (Respondent's Answer). With respect to the allegations raised in the complaint, Complaint Paragraph 8(a), avers that Respondent's change in employment status of four employees from regular or fixed employees to casual and/or temporary employees relegated to be called for work from a "supplemental employee list", the Respondent denied the allegation. (Exhibit 2)
3. Thereafter, on July 18, 2012, Respondent filed before the Board a "Motion for Partial Summary Judgment and Memorandum of Law in Support Thereof" (Respondent's Motion)

and "Statement of Uncontested Facts in Support of Motion for Summary Judgment" (Respondent's Statement). Essentially, the motion contends that the Board should dismiss the Complaint with respect to the allegation that the Respondent failed to bargain over the decision in question because Respondent asserts, there is no dispute that the Union waived its right to bargain by (1) failing to request bargaining with Respondent over its decision and (2) through the process of contract negotiation. The Respondent argues that there is no controversy as to the facts of the case that the Union waived its right to bargain by failing to request bargaining with the Respondent about its decision, and that it also waived its right to bargain over the decision based on the language in the parties' collective bargaining agreement.

4. However, Respondent fails to acknowledge in its Motion and Statement that there were communications between the Union and Respondent in which the Union requested to meet with Respondent and proposed alternatives to try to resolve Respondent's announced change.

II. UNCONTESTED FACTS

1. The Union has been the designated exclusive collective-bargaining representative of the Employer's employees in the following bargaining unit since at least April 15, 2005, when the Union was recognized as the representative of the employees (See Complaint paragraph 6 and 7; Answer to Complaint paragraphs 6 and 7):

   INCLUDED: All of the employees in a unit and employed by the Company in all of the ports on the Island of Puerto Rico engaged in the handling of cargo, loading and unloading of its vessels, including but not limited to delivery clerks, stamping clerks, receiving clerks, tally clerks, dock sailors, refrigeration mechanics and helpers, tinsmiths and welders, carpenters and helpers, electricians and helpers, painters, oilers, janitors, gasoline dispatchers, maintenance helpers, gatemen, switchmen, tow motormen, yard clerks, water boys, hatch tenders, linesmen, stevedores, electro mechanics, riggers, crane operators, signal men, portable crane operators, top loader operators (yard and vessel), coopers, and such other workers employed in the manual operations of loading and unloading of ships, classification of cargo and the receiving and delivery of cargo. The welders of cranes on land and aboard the vessels belong in the contracting unit and their functions will remain as at present.

EXCLUDED: All office employees, including those working on the pier, and excluding likewise all those employees who have supervisory duties.

2. The Respondent and the Union entered into a collective bargaining agreement covering the period of October 1, 2004, through September 30, 2010. The parties' extended the bargaining agreement in writing until September 30, 2012. (Respondent's Motion).

3. The Complaint alleges that Respondent violated Sections 8(a)(1) and (5), by about February 29, 2012, changing the employment status of four employees from regular or fixed employees list to casual and/or temporary list without prior notice to the Union and without affording the Union an opportunity to bargain. (Complaint Exhibit 1 paragraph 8).

4. It is undisputed that by letter dated February 27, 2012, Respondent informed the Union that it would not recruit four unit potions effective February 29, 2012; e.g., 1 utility (Maintenance Department), 2 facilities (Maintenance Department) and 1 janitor (Marine Department). (Respondent's Motion) Respondent sent the letter by fax to the Union at 3:47 pm; by email to Union president Francisco Diaz at 3:53 pm; and by certified mail received on March 5, 2012. (Respondent's Statement, Exhibits 4(a), (b) and (c), respectively) In its letter, Respondent only offered to discuss the *effects* of its decision on February 28 or 29. (Respondent's Motion).

5. It is undisputed that the following individuals have held the positions set forth opposite their respective names and have been agents of Respondent within the meaning of Section 2(11) and 2(13) of the Act (Complaint and Respondent's Answer):

Manuel Lopez Llavona	-	Labor Relations Director
Roberto Batista Pastrana	-	Land Operations Manager
Richard Rodriguez	-	General Manager

II. FACTS IN DISPUTE

As correctly argued by Respondent in its Motion, issues of material facts that could affect the outcome of a litigation under the governing law will properly preclude the entry of summary judgment. It is submitted however that, contrary to Respondent's contentions, the Union did request to bargain over Respondent's February 27 notification that it would stop recruiting four bargaining unit positions and the resulting impact on four unit employees in their change in classification from fixed to casual employees. Therefore, there is a dispute as to the facts of this case that would preclude an entry of summary judgment. In addition, it should be noted that Respondent denied in its Answer the allegation of the Complaint that it has changed the employment status of four employees from regular to casual. (Respondent's Answer) Thus, a main fact is in controversy.

III. APPLICABLE LEGAL STANDARD FOR MOTIONS OF SUMMARY JUDGMENT

Under Section 102.24(b) of the Rules and Regulations, the Board in its discretion may deny a motion for summary judgment where it believes that a genuine issue of fact may exist. A motion for summary judgment may properly be granted only where there is no genuine issue of material fact to be tried, and the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. *See Fed.R.Civ.P. 56(c)*; *see, e.g., Madonna v. American Airlines, Inc.,* 82 F.3d 59, 61 (2d Cir.1996). The function of the court in considering the motion for summary judgment is not to resolve disputed questions of fact but only to determine whether, as to any material issue, a genuine factual dispute exists. See, e.g., *Liberty Lobby*, 477 U.S 242, 249-50, 106 S. Ct. 2505 (1986). **"[W]hen the party against whom summary judgment is sought comes forth with affidavits or other material obtained through discovery that generates uncertainty as to the true state of any material fact, the procedural weapon of summary judgment is inappropriate."** *Quinn v. Syracyse Model,* 613 F.2d 438, 445 (1980) (*Emphasis supplied*). Summary judgment is inappropriate

when the admissible materials produced in opposition to the summary judgment motion "make it arguable" that the claim has merit. *Id.* "The evidence of the non-movant is to be beleived, and all justifiable inferecnes are to be dran in his favor." *Liberty Lobby,* 477 US at 255...(citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59 (1970)) (emphasis added); *Pinney Dock & Transp. Co. v. Penn Cent. Corp.,* 838 F.2d 1445, 1472 (6th Cir.), *cert. denied,* 488 U.S. 880 (1988). Thus, *Rule 56* authorizes summary judgment only "where the moving party is entitled to judgment as a matter of law" on the basis that "no genuine issue remains for trial" because "it is quite clear what the truth is." *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 467, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962) (internal quotation marks omitted).

IV. DISCUSSION AND ANALYSIS OF CONTESTED FACTS

a. Union's Request for effects bargaining

After Respondent's February 27 notification, the Union sent an email to Richard Rodriguez, Respondent's General Manager and an admitted agent of Respondent, on February 28, 2012, requesting to meet that same afternoon to discuss Respondent's decision. Rodriguez offered to meet the following day at the "Fairland", since he already had a meeting scheduled for that same afternoon. (Exhibit 3) In an email dated February 29 from General Manager Rodriguez to Union President Diaz, Rodriguez stated that there was nothing that could be done "about the fixed positions in which the janitor from the Marine Department was included." (Exhibit 4) The Union replied to General Manger Rodriguez's email proposing to allow Respondent to "report on Sundays" at 12 noon in exchange for keeping all of the positions. (Exhibit 4) Union President Diaz copied Labor Relations Manager Manuel Lopez Llavona and Fernando Guardiola from Respondent's company on the email.

In addition to the email exchange, Respondent failed to acknowledge in its Motion and Statement that there was a telephone conference held on February 28 between General Manager Richard Rodriguez and several Union officials, including Union President Diaz, in which the Union requested Respondent to stop the announced change in order for the Union to have time to seek alternatives. Counsel for the Acting General Counsel submits that if a hearing is held testimony will be provided at the hearing to that effect.

In its Motion Respondent claims that after it informed the Union that it would no longer recruit four unit positions the Union failed to request bargaining about its decision and the effects of such decision. In this regard, Respondent alleges that the only communication from the Union since the February 27 notification of the announced change was a March 2 letter from the Union. Respondent claims that there is no dispute that the Union failed to request to bargain about its decision before the Union's March 2 letter. Thus, it concludes that the Union waived its right to bargain by inaction.

In this instance, emails of February 28 and 29 clearly exchanged between the Union and an admitted agent of Respondent, General Manager Richard Rodriguez, have been submitted to demonstrate that after Respondent's notification of February 27, the Union attempted to discuss the matter with Respondent and made a proposal in order to reach an agreement about the elimination of the fix positions and the resulting change in the employee's classification from fix to casual. Thus, is not undisputed, as Respondent contends, that the Union failed to request bargaining after the February 27 notification. There is a dispute about a core fact in that might affect the outcome of the case, since Respondent alleges that the Union simply did not act after the notification of the change, an allegation that has been rebutted by documentary evidence to the contrary. It is not undisputed that the Union waived its right to bargain by "inaction," as alleged. Therefore, the outstanding

Compliant in this matter raises substantial and material issues of fact as to which there is a genuine dispute, the merits of which are presently scheduled to be heard before an Administrative Law Judge.

b. Clear and unmistakable waivers

Respondent claims that it is uncontested that the Union, through the process of contract negotiation, unmistakably waived its right to *decisional* bargaining with respect to the elimination of fixed positions and the ensuing change in employees' classification from fixed to casual. In this regard, Respondent only provided in support of its claim language contained in the parties' contract for the proposition that it has the authority to establish the number of employee's to be employed, and therefore concludes that it can eliminate fix positions at whim. Additionally, without submitting any supporting evidence, Respondent contends that the parties past practice in similar cases was to place employees affected in an applicable alternate list and that the "only possible reasons for the quoted contractual language is that the parties agreed that for all other instances where there is no fixed manning requirement, it is the Employer who determines the number of positions it is going to recruit."

Section 8(a)(5) of the Act makes it unlawful for an employer to make unilateral changes to mandatory subjects of bargaining without negotiations with the exclusive collective-bargaining representative of its employees. *NLRB v. Katz,* 369 U.S. 736 (1962). Therefore, an employer may not make unilateral changes in conditions of employment unless the union expresses a clear and unmistakable waiver of its right to bargain. *American Broadcasting Co.,* 290 NLRB 86, 88 (1988); *California Pacific Medical Center,* 337 NLRB 910 (2002).

A waiver occurs when a union "knowingly and voluntarily relinquishes its right to bargain about a matter. . . . When a union waives its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full

discretion to the employer on that matter. For that reason, the courts require 'clear and unmistakable' evidence of waiver and have tended to construe waivers narrowly." *Department of the Navy, Marine Corps Logistics Base v. FLRA,* 962 F.2d 48, 57 (D.C. Cir. 1992).

The Board has relied upon several factors in assessing whether a clear and unmistakable waiver exists: (1) language in the collective-bargaining agreement, (2) the parties' past dealings, (3) relevant bargaining history, and (4) other bilateral changes that may shed light on the parties' intent. See *Johnson-Bateman,* 295 NLRB 180, 184-187 (1989); *American Diamond Tool,* 306 NLRB 570 (1992). **The party asserting the waiver bears the burden of establishing the existence of the waiver.** *Pertec Computer,* 284 NLRB 810 (1984). Assessing the clarity with which a statutory right must be waived, requires consideration of the circumstances of each case. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

As previously stated, Respondent has not submitted any supporting evidence as to all the factors generally relied upon by the Board to make a conclusive finding that the Union waived its right to bargain about Respondent's decision to eliminate fix positions and the resulting change in classification of employees from fix to casual employees. The language of the collective bargaining agreement is not the only factor considered to make an irrefutable finding that the Union waived its right to bargain. Although Respondent argues that it has acted in accordance to past practice and that there is only one plausible reason for the parties' reaching the contractual language cited, it submitted **no evidence** of the parties' past dealings or the relevant bargaining history between the parties in support of its contention. Respondent is merely relying on its arguments, without supporting evidence, to reach a conclusion that it is uncontested that the Union waived its right to decisional bargaining. In this respect, it should be noted that in the case cited by Respondent in its Motion, in support of its argument that the Union waived its right to decision bargaining, *Kennametal Inc.*, 358 NLRB No. 68 (June 26, 2012) , the Board noted that the parties had no consistent past practice about

negotiating the safety rules at issue, that in some instances they negotiated the rules and in other the employer implemented the rules unilaterally. Again, the contract language is not the only factor to be taken in consideration to make a determination of a clear and unmistakable waiver as Respondent pretends. In addition, it should be noted that a party asserting a waiver has the burden of establishing the existence of such waiver and in this case Respondent failed to properly support its assertion of the fact that the Union waived its right to bargain under the factors considered by the Board. Therefore, it is not uncontested that the Union waived its right to decision bargaining as alleged.

V. CONCLUSION

Based on the above, it is submitted that the outstanding complaint in this matter raises substantial and material issues of fact as to which there is a genuine dispute, the merits of which should be heard before an administrative law judge.

WHEREFORE, Counsel for the Acting General Counsel request that Respondents' Motion for Partial Summary Judgment be denied.

I HEREBY CERTIFY that "Counsel for Acting General Counsel's Oppositon to Respondent's Motion for Partial Summary Judgement" has been served by email to Antonio Cuevas Delagdo, Esq. acuevas@ckblawpr.com and Arturo Luciano Delgado, Esq. lucianolawoffice@aol.com.

Dated at San Juan, Puerto Rico this 30th day August 2012.

Ayesha K. Villegas Estrada
Counsel for Acting General Counsel
National Labor Relations Board
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San Juan PR 00918
Tel (787) 766-5477 Fax (787) 766-5277
Ayesha.villegas-estrada@nlrb.gov

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24

HORIZON LINES OF PUERTO RICO, INC. and INTERNATIONAL LONGSHOREMEN ASSOCIATION, LOCAL 1575	Case 24-CA-075533

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing, which is based on a charge filed by International Longshoremen Association, Local 1575 (the Union), is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board, and alleges that Horizon Lines of Puerto Rico, Inc. (Respondent) has violated the Act by engaging in the following unfair labor practices:

1. The charge was filed by the Union on February 28, 2012, and a copy was served by regular mail on Respondent on February 29, 2012.

2. (a) At all material times, Respondent has been a corporation with an office and place of business in San Juan, Puerto Rico, and has been engaged in the handling, loading and unloading of cargo.

(b) In conducting its operations during the calendar year ending December 31, 2011, Respondent derived gross revenues in excess of $50,000 for the transportation of freight directly from points outside the Commonwealth of Puerto Rico.

Exhibit 1

(c) In conducting its operations during the calendar year ending December 31, 2011, Respondent Employer performed services valued in excess of $50,000 in States other than the Commonwealth of Puerto Rico.

3. At all material times Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. At all material times the following individuals held the positions set forth opposite their respective names and have been agents of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Manuel Lopez Llavona	-	Labor Relations Director
Roberto Batista Pastrana	-	Land Operations Manager
Richard Rodriguez	-	General Manager

6. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> INCLUDED: All of the employees in a unit and employed by the Company in all of the ports on the Island of Puerto Rico engaged in the handling of cargo, loading and unloading of its vessels, including but not limited to delivery clerks, stamping clerks, receiving clerks, tally clerks, dock sailors, refrigeration mechanics and helpers, tinsmiths and welders, carpenters and helpers, electricians and helpers, painters, oilers, janitors, gasoline dispatchers, maintenance helpers, gatemen, switchmen, tow motormen, yard clerks, water boys, hatch tenders, linesmen, stevedores, electro mechanics, riggers, crane operators, signal men, portable crane operators, top loader operators (yard and vessel), coopers, and such other workers employed in the manual operations of loading and unloading of ships, classification of cargo and the receiving and delivery of cargo. The welders of cranes on land and aboard the vessels belong in the contracting unit and their functions will remain as at present.
>
> EXCLUDED: All office employees, including those working on the pier, and excluding likewise all those employees who have supervisory duties.

7. (a) Since at least on or about April 15, 2005, the Union has been the designated exclusive collective-bargaining representative of the Unit and since then the Union has been recognized as the representative by the Respondent. This recognition has been embodied in a collective bargaining agreement which expired, by its terms, on September 30, 2010, and was extended, in writing, until September 30, 2012.

(b) At all times since April 15, 2005, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

8. (a) About February 29, 2012, Respondent changed the employment status of four employees from regular or fixed employees to casual and/or temporary employees relegated to be called for work from a "supplemental employee list".

(b) The subject set forth above in paragraph 8(a) relates to wages, hours, and other terms and conditions of employment of the Unit and is a mandatory subject for the purposes of collective bargaining.

(c) Respondent engaged in the conduct described above in paragraph 8(a) without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

9. By the conduct described above in paragraph 8, Respondent has been failing and refusing to bargain collectively, and in good faith, with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

10. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

As part of the remedy for the unfair labor practices alleged above in paragraph 8, the Acting General Counsel seeks an Order requiring Respondent to: a) upon request of the Union, rescind the unilateral change alleged herein; b) make whole the employees in the Unit for any loss of pay or benefits they may have suffered as a result of said unilateral change alleged; and c) bargain with the Union in good faith to an agreement or to impasse concerning any proposed changes.

As part of the remedy for the unfair labor practices alleged above in paragraph 8, the Acting General Counsel seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no unilateral change.

The Acting General Counsel further seeks, as part of the remedy for the allegations in paragraph 8, that Respondent be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods.

The Acting General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be received by this office on or before July 13, 2012, or postmarked on or before July 12, 2012. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **File Case Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **September 19, 2012, 9:30 am** at the **NLRB Hearing Room, La Torre de Plaza, Plaza Las Américas Mall, Suite 1002, 525 F.D. Roosevelt Ave., San Juan, Puerto Rico,** and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

All parties are reminded of the National Labor Relations Board's standard procedures in formal unfair labor practice proceedings which provide that all exhibits offered for evidence shall be filed in duplicate. In the event a duplicate copy of the exhibit which has been received in evidence has not been submitted to the Administrative Law Judge prior to the close of hearing, and the filling of said duplicate has not for good reason shown been waived by the Administrative Law Judge, any ruling receiving the exhibits may be rescinded and the exhibits rejected.

Dated at San Juan, Puerto Rico this 29th day of June 2012.

Marta M. Figueroa, Regional Director
National Labor Relations Board, Region 24
La Torre de Plaza, Suite 1002
525 F.D. Roosevelt Ave.
San Juan, P.R. 00918-1002

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24

HORIZON LINES OF PUERTO RICO INC. and INTERNATIONAL LONGSHOREMEN ASSOCIATION, LOCAL 1575	Case No. 24-CA-075533

ANSWER TO THE COMPLAINT

TO THE NATIONAL LABOR RELATIONS BOARD:

COMES, NOW, HORIZON LINES OF PUERTO RICO, INC., through its undersigned attorneys and respectfully **STATE** and **PRAY** as follows:

1. Paragraph One of the Complaint is **ADMITTED.**

2. Paragraph Two (a), (b) and (c) of the Complaint are **ADMITTED.**

3. Paragraph Three of the Complaint is **ADMITTED.**

4. Paragraph Four of the Complaint is **ADMITTED.**

5. Respondent **ADMITS** that the listed individuals hold the named position. It is affirmatively alleged, however, that for the subject matter encompassed in this Complaint the designated Company's spokesperson to bargain with the Union was Mr. Manuel López Llavona, Horizon's Director of Labor Relations.

6. Paragraph Six of the Complaint is **ADMITTED.**

Exhibit 2

7. Paragraph Seven (a) and (b) of the Complaint are **ADMITTED**.

8. Paragraph Eight (a), (b), and (c), of the Complaint are **DENIED**.

9. Paragraph Nine of the Complaint is **DENIED**.

10. Paragraph Ten of the Complaint is **DENIED**.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which a relief can be granted.

2. The Complaint fails to address the core-decision taken by the Respondent and refers only to the consequence of the same.

3. The core-decision taken by the Respondent corresponds to a managerial prerogative for which there is no obligation to bargain.

4. In any case, no material or substantial change in the terms of employment of any employee was made by the questioned conduct.

5. In any case, if there was any decision–bargaining obligation in this case, the burden placed on the conduct of the business by bargaining outweighs the benefit for labor management relations and the collective bargaining process.

6. In the alternative, if it is determined that there was any decision bargaining obligation in this case, the Union waived any such right as it never specifically requested it.

7. In the alternative, there was no obligation to further bargain about the decision taken having previously engaged in collective bargaining over this matter to an agreement that resulted in specific provisions of the Collective Bargaining Agreement which has been applied and executed before.

8. The Complaint pleads statutory violations that are not closely related to those in the charge.

9. As to effect-bargaining, the Respondent not only notified the Union that it was willing to bargain about any effect of its core-decision but also made itself available to do so through its designated officer.

10. The Union failed to meet with the Company to discuss the effects of the Company's decision.

11. The Union has failed and refused to bargain collectively and in good faith with the Company by refusing to meet with the designated officer of Horizon Lines of Puerto Rico, Inc.

12. In the alternative, the effects of the Company's core decision was already negotiated in the Collective Bargaining Agreement and applied and executed before so that the Company did not need to bargain over it again.

13. In the alternative, the Company has in fact bargained the effects of its core-decision.

14. In the alternative, the parties bargained to an impasse and consequently the Company was free to implement its proposal.

15. In the alternative, any effect of the Company's core-decision that has not been bargained before is inherent in the decision itself so that the contractual privilege/waiver regarding the decision will apply with equal force to any such effect.

16. The effect bargaining remedy is moot for the parties have started negotiations for a new Collective Bargaining Agreement to become effective on October 1, 2012.

16. In the alternative, all interim earnings should be deducted from any back pay.

17. In the alternative, any remedy should be governed by *Transmarine Navigation Corp. 10 NLRB (1986)* and *Compu-Net-Communications, 315 NLRB 216, Fn.3 (1994).*

18. The Respondent reserves its right to amend-this Answer to include or exclude any affirmative defense.

WHEREFORE, Respondent respectfully requests that the Complaint be **DENIED** and consequently **DISMISSED**.

RESPECTFULLY SUBMITTED.

IT IS HEREBY CERTIFIED that on this same day the foregoing document was filed as a Pdf document containing the required signature so that no paper copies need to be notified to the Regional Office. It is also

certified that the Union has been notified with a true copy of this document pursuant to Section 102.114 of the Board's Rules and Regulations.

In San Juan, Puerto Rico this 13th day of July, 2012.

CUEVAS KUINLAM, MÁRQUEZ, O'NEILL
For Respondent Horizon Lines of Puerto Rico Inc.
416 Escorial Avenue
Caparra Heights, San Juan, PR 00920
Telephone: 787-706-6464
Facsimil: 787-706-0035

By: _____
ANTONIO CUEVAS DELGADO
UDSC-PR No. 208014
Email: acuevas@ckblawpr.net

-----Original Message-----
From: Rodriguez, Richard
Sent: Tuesday, February 28, 2012 1:52 PM
To: 'Francisco Diaz'
Cc: Felipe Garcia
Subject: RE: reunion hoy

Paco

Hoy no puedo ya que tengo el "staff meeting" con Brian Taylor que empieza a las 4:00. Mañana puedo en el Fairland temprano.

Vienes solo o con un equipo? Si vienes acompañado Tony estara presente. Dejamen saber.

Richard

-----Original Message-----
From: Francisco Diaz [mailto:fdiazmorales@hotmail.com]
Sent: Tuesday, February 28, 2012 1:22 PM
To: Rodriguez, Richard
Cc: Felipe Garcia
Subject: reunion hoy

Richard te estoy llamando para reunirnos hoy por lA tarde en la union ya que el caso que habia fue suspendido espero tu llamada

Enviado desde mi iPhone

** ATTENTION ** This email and any attachments may contain confidential or privileged information. If you have received this email in error, please notify the sender by return email and delete immediately without forwarding to others. [HRZ Disclaimer 1]

Exhibit 3

-----Original Message-----
From: Rodriguez, Richard
Sent: Tuesday, February 28, 2012 1:52 PM
To: 'Francisco Diaz'
Cc: Felipe Garcia
Subject: RE: Meeting today

Paco

I can't today since I have a staff meeting with Brian Taylor which starts at 4:00. I can tomorrow at the Fairland early.

Are you coming alone or with the team? If you come accompanied Tony will be present. Let me know.

Richard

-----Original Message-----
From: Francisco Diaz [mailto:fdiazmorales@hotmail.com]
Sent: Tuesday, February 28, 2012 1:22 PM
To: Rodriguez, Richard
Cc: Felipe Garcia
Subject: Meeting today

Richard I am calling you to meet today during the afternoon at the union since the case we had was suspended waiting for your call

Sent by my iPhone

** ATTENTION ** This email and any attachments may contain confidential or privileged information. If you have received this email in error, please notify the sender by return email and delete immediately without forwarding to others. [HRZ Disclaimer 1]

----- Forwarded message -----
From: "francisco.diazmorales@gmail.com" <francisco.diazmorales@gmail.com>
To: "Rodriguez, Richard" <RRodriguez@horizonlines.com>
Cc: "Francisco Diaz" <fdiazmorales@hotmail.com>, "Lopez-Llavona, Manuel" <MLopez@horizonlines.com>, "Guardiola, Fernando" <FGuardiola@horizonlines.com>, "Efrain robles" <efrainrobles567@hotmail.com>
Subject: acuerdo
Date: Wed, Feb 29, 2012 5:07 pm

Pon todas las plazas y te dejo reportar los domingos hasta las doce del medio dia y acuerdate que lopez no puede negociar con nosotros

Enviado desde mi iPhone

El 02/29/2012, a las 04:23 p.m., "Rodriguez, Richard" <RRodriguez@horizonlines.com> escribió:

> Paco entiendo que este acuerdo debe de ser atendido entre tu y Fernando y/o Tony pero para encontrar una solucion entiendo que esto es razonable y puedo defender el gasto extra de chito.
>
> Dejar a chito 3 dias a descrecion de la compania a cambio de aceptar las ordenes del barco del lunes los domingos hasta las 4:00 PM. Est.. acuerdo seria hasta Septiembre 30, 2012. Confirma si estas de acuerdo por simple e-mail.
>
> Desgrasiadamente no puedo hacer nada con los fijos el cual el janitor de marine esta incliuido. Crèeme la situacion esta critica.
>
>
>
> _____
>
> ** ATTENTION ** This email and any attachments may contain
> confidential or privileged information. If you have received this
> email in error, please notify the sender by return email and delete
> immediately without forwarding to others. [HRZ Disclaimer 1]

Exhibit 4

----- Forwarded message -----
From: "francisco.diazmorales@gmail.com" <francisco.diazmorales@gmail.com>
To: "Rodriguez, Richard" <RRodriguez@horizonlines.com>
Cc: "Francisco Diaz" <fdiazmorales@hotmail.com>, "Lopez-Llavona, Manuel" <MLopez@horizonlines.com>, "Guardiola, Fernando" <FGuardiola@horizonlines.com>, "Efrain robles" <efrainrobles567@hotmail.com>
Subject: Agreement
Date: Wed, Feb 29, 2012 5:07 pm

Put all of the positions and I'll let you report on Sundays until twelve midday and remember that lopez cannot negotiate with us

Sent by my iPhone

On 02/29/2012, at 04:23 p.m., "Rodriguez, Richard" <RRodriguez@horizonlines.com> wrote :

> Paco I understand that this agreement should be attended between you and Fernando and/or Tony but to find a solution I understand that this is reasonable and I can defend Chito's extra expense.
>
> Leave chito 3 days at the company's discretion in exchange for accepting Monday's boat orders on Sundays until 4:00 PM. This agreement would be until September 30, 2012. Confirm if you are in agreement by a simple e-mail.
>
> Unfortunately I cannot do anything with the permanents which includes the marine manager. Believe me the situation is critical.
>
>
>
> _____
>
> ** ATTENTION ** This email and any attachments may contain
> confidential or privileged information. If you have received this
> email in error, please notify the sender by return email and delete
> immediately without forwarding to others. [HRZ Disclaimer 1]